Nos. 05-35569, 05-35570, 05-35646

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL WILDLIFE FEDERATION, IDAHO WILDLIFE FEDERATION, WASHINGTON WILDLIFE FEDERATION, SIERRA CLUB, TROUT UNLIMITED, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, INSTITUTE FOR FISHERIES RESOURCES, IDAHO RIVERS UNITED, IDAHO STEELHEAD AND SALMON UNITED, NORTHWEST SPORTFISHING INDUSTRY ASSOCIATION, FRIENDS OF THE EARTH, SALMON FOR ALL, COLUMBIA RIVERKEEPER, NW ENERGY COALITION, FEDERATION OF FLY FISHERS, and AMERICAN RIVERS, INC.,
Plaintiffs-Appellees

and

STATE OF OREGON
Plaintiff-Intervenor-Appellee

v.

NATIONAL MARINE FISHERIES SERVICE, UNITED STATES ARMY CORPS OF ENGINEERS, and U.S. BUREAU OF RECLAMATION,
Defendants-Appellants

and

NORTHWEST IRRIGATION UTILITIES, PUBLIC POWER COUNCIL, WASHINGTON STATE FARM BUREAU FEDERATION, FRANKLIN COUNTY FARM BUREAU FEDERATION, GRANT COUNTY FARM BUREAU FEDERATION, STATE OF IDAHO, and BPA CUSTOMER GROUP,
Defendants-Intervenors-Appellants.

On Consolidated Appeals from the United States District Court
for the District of Oregon
Judge James A. Redden, CV 01-640-RE

BRIEF FOR FEDERAL APPELLANTS

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STATEMENT OF JURISDICTION

Plaintiffs invoked the jurisdiction of the district court under 5 U.S.C. §§701-706, 28 U.S.C. §1331, and 16 U.S.C. §1540(a). Federal Appellants' Excerpts of Record ("ER") 10. On June 10, 2005, the district court entered an immediately effective preliminary injunction against the U.S. Army Corps of Engineers ("Corps"). ER560-570. Federal defendants timely filed a notice of appeal on June 15, 2005. ER571. This Court's jurisdiction rests on 28 U.S.C. §1292(a)(1).

STATEMENT OF THE ISSUE ON APPEAL

The district court entered a mandatory preliminary injunction in this Endangered Species Act ("ESA") case, requiring the Corps to provide, or to increase, spill at four dams on the Snake River and one dam on the Columbia River during the 2005 summer months. In simple terms, "spill" as used herein means passing water through the spillgates of the dams instead of directing it through turbines for power generation. Broadly stated, the issue on appeal is whether the district court abused its discretion by ordering this injunctive relief.

STATEMENT OF THE CASE

A. Nature of the case and proceedings below. – The National Wildlife Federation, *et al.*, (collectively "NWF") and the State of Oregon challenge the 2004 Biological Opinion ("2004 BiOp") rendered by the National Oceanic and Atmospheric Administration ("NOAA") through the National Marine Fisheries

Service ("NMFS", sometimes referred to as "NOAA Fisheries") and the U.S. Army Corps of Engineers' ("Corps'") and Bureau of Reclamation's ("BOR's") decisions governing operations of the Federal Columbia River Power System ("FCRPS") and certain BOR projects. The FCRPS is a system of 14 dams and associated facilities on the Columbia and Snake rivers located in Idaho, Montana, Oregon and Washington. All of the dams and reservoirs were constructed between 1938 and 1975, before any salmon were listed pursuant to the ESA. The projects within the system are operated under a variety of statutory mandates for multiple purposes, including recreation, fish and wildlife, water quality, water supply, providing hydropower, flood control, navigation and water supply. *See* ER 271-273.

On May 26, 2005, the district court granted NWF's and Oregon's motions for summary judgment against NMFS, holding that the 2004 BiOp was invalid because, in the court's view, NMFS: 1) improperly excluded non-discretionary elements of the proposed action, 2) based its jeopardy analysis on the net incremental effect of the discretionary actions rather than basing it on the aggregation of impacts from the environmental baseline, cumulative effects, and the action, 3) failed to sufficiently analyze the listed species' prospects for recovery in its jeopardy analysis, and 4) failed to adequately consider short-term impacts to critical habitat, in context of life

cycles and migration patterns and needs. ER325-381. The May 26, 2005, order was a non-final, non-appealable order. ER367.

NWF sought a mandatory preliminary injunction requiring the Action Agencies (the Corps and BOR) to alter system operations to provide, *inter alia*, increased flow velocity in the rivers and increased spill at the five dams at issue. Clerk's Record ("CR") 834. On May 25, 2005, the court ordered that it would not hold an evidentiary hearing on the preliminary injunction motion. ER322. In a subsequent order, the court denied Federal Defendants' request to conduct discovery into the bases for Plaintiffs' and Amicus Tribes' proffered expert testimony. ER382. Federal Defendants submitted numerous declarations by agency experts contesting factual assertions made by Plaintiffs and their amici in support of the preliminary injunction motion and demonstrating the harm that would result from the requested relief. CR 930-40, 997-1002, 1004-06; ER92-318,383-559.

In an order issued June 10, 2005, the court stated that NMFS had unlawfully restricted the basis of its jeopardy analysis in the 2004 BiOp to discretionary aspects of the proposed action and held that because the Action Agencies' decisions relied on NMFS's 2004 BiOp without an independent rational basis for doing so, the Action Agencies' decisions violate the ESA. ER562,565. The district court issued an injunction requiring the action agencies to:

> (1) Provide spill from June 20, 2005, through August 31, 2005, of all water in excess of that required for station service, on a 24-hour basis, at the Lower Granite, Little Goose, Lower Monumental, and Ice Harbor Dams on the lower Snake River; and
> (2) Provide spill from July 1, 2005, through August 31, 2005, of all flows above 50,000 cfs, on a 24-hour basis, at the McNary Dam on the Columbia River.

ER569-570.[1] The court's explanation for granting this injunction is cursory. The order summarily states that the court "find[s] that irreparable harm results to listed species as a result of the action agencies' implementation of the updated proposed action." ER568. The court makes no finding that the ordered spill will avoid this irreparable harm. Rather, the court suggests that spill during summer months would serve a research purpose – *i.e.*, would allow for a comparison to be made between in-river migration and the summer transportation program. ER567-568. It also suggests that restricting summer spill does not preserve spread-the-risk considerations that govern the spring migration program. ER568. The June 10 order does not address any of the numerous declarations filed by the government showing that the spill ordered by the court will not improve salmon survival, may cause biological harm to listed species, will not be comprehensively evaluated, and will cause economic harm.

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[1] Pursuant to a "spill implementation plan" agreed to by NWF and filed in district court, the Corps is complying with the order by operating the powerhouses at the four lower Snake River dams at the low end of the 1% peak efficiency range on one generating unit. This is approximately 11,500 cfs at Lower Granite, Little Goose, and Lower Monumental; and 9,500 cfs at Ice Harbor.

The court reserved filing a final order until some time after a September 7, 2005 status conference. ER564,568

B. Section 7(a)(2) of the Endangered Species Act. – Section 7(a)(2) of the Endangered Species Act ("ESA"), provides:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat ...unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section.

16 U.S.C. §1536(a)(2).

Regulations implementing §7(a)(2) state: "Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. §402.03 (emphasis added). The regulations also provide: "*'Jeopardize the continued existence of'* means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. §402.02. A "jeopardy" conclusion is not compelled just because some adverse effects will result. 51 Fed. Reg. 19,926, 19,950 (June 3, 1986) ("Adverse effects may exist without constituting jeopardy.").

To assist the federal agency in determining whether the substantive standards of §7(a)(2) will be met, the consulting agency (NMFS for salmonid species) provides a "biological opinion" that includes a "summary of the information on which the opinion is based," a "detailed discussion of the effects of the action on listed species or critical habitat," and NMFS's opinion on "whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat . . ." 50 C.F.R. §402.14(h). *See also* 16 U.S.C. §1536(b)(3)(A); 50 C.F.R. §402.02 (defining "biological opinion"). To make the ultimate jeopardy/no jeopardy determination, NMFS must evaluate and consider, *inter alia*, the "current status of the listed species or critical habitat," the "effects of the action," and "cumulative effects" (*i.e.*, future state or nonfederal activities that are reasonably certain to occur). 50 C.F.R. §402.14(g)(2)-(3). "Effects of the action" include both direct and indirect effects of an action that will be added to the "environmental baseline." 50 C.F.R. §402.02. The environmental baseline includes, *inter alia*, "the past and present impacts of all Federal, State or private actions and other human activities in the action area" and "the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation." *Id.*

When evaluating the effects of the action, NMFS must "give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation." 50 C.F.R. §402.14(g)(8); 51 Fed. Reg. at 19,953. Thus, NMFS must consider both the detrimental, as well as the beneficial, effects of the action in determining the impact that will result from "the action."

C. Statement of Facts. –

1. The 2000 BiOp. – The fourteen dams that comprise the FCRPS, all of which were constructed before any salmon were listed pursuant to the ESA, cannot be removed without congressional action and must be continuously operated in some manner. As explained in the argument below, the existence of the dams historically has been and presently is properly treated as part of the environmental baseline. As compared to assessment of the impacts from a new unconstructed project, where the environmental baseline is simply the pre-project action area that is distinctly separable from the proposed federal action, the assessment of the impact of discretionary operations or modification of dams and reservoirs from existing structures and mandatory operations that are part of the environmental baseline is more difficult. The complexity of FCRPS operations, the number of other factors that

affect salmon survival, and the unsettled science relevant to fish survival also pose challenges.

Since the first listings of salmon under the ESA in 1991, the action agencies have repeatedly consulted with NMFS on FCRPS operations. *NWF v. NMFS*, 254 F. Supp. 2d 1196, 1200-01 (D. Or. 2003). While there is still much to be learned, this process has yielded considerable technical and scientific information and agency expertise with various analytical approaches. The process has precipitated considerable litigation and court decisions. All of these factors provide context for understanding the refinement of the analytical approach reflected in the 2004 BiOp.

In December 2000, NMFS issued a BiOp on long-term FCRPS operations as proposed by the Action Agencies in 1999. NMFS found the proposed action likely to jeopardize eight of the 12 affected species. As required by the ESA, NMFS, working with the Action Agencies, developed a Reasonable and Prudent Alternative ("RPA") to avoid jeopardy. *See* 16 U.S.C. §1536(b)(3)(A) . The RPA set out 199 measures as a starting point for long-term operations. *See* ER1280-97. A flexible, adaptive management approach (originally set forth in the 1995 BiOp) was carried forward. *See* ER1281-83. Thus, although quite detailed, the RPA was expressly subject to modification through annual implementation planning with further input from NMFS.

The 2000 BiOp did not attempt to address the narrow question, dictated by the statute and regulations, of whether the agencies' "action" was "likely to jeopardize." Rather, it took a broader, range-wide approach which was a product both of the consultation history and the regional interest in a broad analysis covering the species' entire life-cycles. *See* ER1267-71. Thus, NMFS attempted to predict the likelihood that the biological needs of the listed fish species would be met over the next 100 years in light of future actions, predicted in the aggregate, to be taken by many actors (not just the Action Agencies) throughout the species' range. *See* ER598,607-608.

NWF brought the present action to challenge the 2000 BiOp. On May 7, 2003, the district court held that the 2000 BiOp was invalid, finding that NMFS had impermissibly included in its analysis federal actions that had not undergone Section 7 consultation (and thus were not properly in the "environmental baseline") and non-federal mitigation actions that were not reasonably certain to occur (and thus not properly "cumulative effects"). *NWF v. NMFS*, 254 F. Supp. 2d at 1213.

2. The 2004 BiOp. – On remand, the Action Agencies' proposed action – the Updated Proposed Action ("UPA") – was similar to, and based upon, the 2000 BiOp's RPA (as refined and updated). ER609-610. Relying on updated scientific information and data, the 2004 BiOp concludes that the UPA is not likely to

jeopardize the continued existence of any listed species, nor to destroy or adversely modify designated critical habitat. ER609-610,901-940.

The analytical approach taken in the 2004 BiOp is different from the 2000 BiOp approach for reasons NMFS explains. NMFS concluded that to address the district court's concerns with the 2000 BiOp it was required to change the methodology for applying the Section 7(a)(2) standards in this context. ER598,1618. It was inherently impossible for the agency to make informed projections into the future and across the species' range as it had attempted in the 2000 BiOp, while at the same time limiting consideration to only the proposed action and to the environmental baseline and cumulative effects within the action area as required by the court. In short, the court's holding on the 2000 BiOp had effectively rejected the range-wide, long-term approach and the application of the scientific tools utilized in 2000.

In the 2004 BiOp NMFS refined its analytical approach to conform more closely to actual Section 7 requirements. ER598-605,1618. Rather than comprehensively attempting to predict and consider the full range of effects to which the fish would be subjected up to 100 years into the future, NMFS isolated and focused precisely upon the effects of "the action." To do this, NMFS applied 50 C.F.R. §402.03, which requires parsing out those parts of "the action" that were discretionary and therefore subject to consultation, from those that are not.

ER602,644. The dams' existence and certain non-discretionary ongoing operations were identified as part of the pre-existing "environmental baseline," rather than part of the "action." ER644. This is because the agencies have neither the authority to change nor discretionary control over these elements.

The 2004 approach also reflects the principle that the inquiry under §7(a)(2) should be whether or not the direct or indirect effects of the discretionary action are likely to "jeopardize the continued existence of" a listed species, as defined in the regulations, 50 C.F.R. §402.02, or result in the destruction or adverse modification of designated critical habitat. Thus, the inquiry under the statute and regulations is *not* whether the effects of the discretionary action when added to the baseline and cumulative effects would result in "jeopardy" (which is not defined in the regulations) or adverse modification. ER1609, 1643-44. "Jeopardize the continued existence of" is defined in the regulations, and means "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. §402.02.

Even though some of the FCRPS operations such as flood control for public safety are non-discretionary, NMFS treated most of these non-discretionary operations as though they were the discretionary operations when assessing the

effects of the action. ER650-652. Only contractually-mandated irrigation water withdrawals for six BOR projects were included in the environmental baseline for NMFS' analysis. ER652,1628-29. Thus, the approach was conservative and precautionary in favor of species. ER651.

To estimate the incremental effects that would be added to the baseline from the proposed action, NMFS compared the effects of the UPA to a hypothetical "Reference Operation." ER648-649,1628-29. The Reference Operation is a set of theoretical operational parameters for the dams that, given their existing structures, would maximize fish survival. ER651,994. NMFS did not generally limit its Reference Operation's objective of minimizing mortalities from the existing FCRPS structures to recognize the need to perform non-discretionary operations. ER1628-29. In other words, the Reference Operation model assumed the agencies could implement many measures to alter their operations for the benefit of listed salmon, when in reality the agencies lacked the authority or discretion to make many of the changes set forth in the Reference Operation. ER1629; *see generally* ER648-731,994-1183. Again, in this way the analysis errs on the side of fish protection.

NMFS concluded that for three species, the UPA would cause no net reduction in the species' current reproduction, numbers or distribution, as compared to the

Reference Operation. *See* ER906.[2] As to the other nine species, NMFS found reductions in the short term, *id.*, but determined, without reliance on longterm improvements, that these reductions were not "appreciable" reductions in terms of the species' likelihood of both survival and recovery and thus inherently could not be likely to "jeopardize the continued existence of" any listed species. ER906-937. For eight of these nine species, NMFS found that recent strong adult returns and increasing productivity trends indicate a reduced range-wide risk so that short-term reductions would not have any serious consequences. *See* ER906,909,913-914,918,922,927-928,933.[3] In addition, NMFS found that over the ten-year term of the action, as the beneficial off-site actions and hydrosystem configuration improvements are implemented, the positive effects would counterbalance initial negative effects. ER605,903-938.

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[2] With respect to Snake River sockeye, NMFS concluded that there would be no net reduction in numbers, reproduction, or distribution, but that there would be short-term alterations of critical habitat. ER935-937. NMFS further concluded that the habitat alteration was not significant because of conservation hatchery production on which the species relies. *Id.*

[3] With respect to the other species, NMFS concluded that the short-term reduction for Columbia River chum salmon was not appreciable because there are population groups below Bonneville Power Dam while the presence of this species above Bonneville Dam was questionable, and because the species had stable population trends from 1990 through 2003. ER935.

3. The Corps' Record of Consultation and Statement of Decision. – On January 3, 2005, the Corps issued a Record of Consultation and Statement of Decision, the decision document providing the Corps' decision to implement actions identified in the UPA and considered in the NMFS Biological Opinion. ER1668-89.

4. The Spill Regime at the Dams at Issue. – The Corps collects a portion of salmon migrating downstream at four of the five dams that are subject to the district court's injunctive order (Lower Granite, Little Goose, and Lower Monumental Dams on the lower Snake River and McNary Dam on the Columbia River) and then transports the fish by barge or, to a limited extent, by truck to below Bonneville Dam (the furthest downstream dam on the Columbia), where they can continue their migration to sea. *See generally American Rivers v. NMFS*, 126 F.3d 1118, 1120-1121 (9th Cir. 1997) (describing ways juveniles migrate); ER653-660(same). Under the 2004 UPA (and previously under the 2000 BiOp RPA), there is usually no summer spill at these collector projects. *See* ER306-310,1013.[4] The absence of summer spill at the collector projects allows the Corps to maximize collection of migrating juvenile fall Chinook, a species whose juveniles migrate during summer. ER306-307.

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[4] Under both the 2000 RPA and 2004 BiOp there would be some spill at Ice Harbor, a noncollector project, though not as much as the court ordered. *See* ER1294 (Table 9.6-3), ER1550 (Table 4).

This mode of operation reflects NMFS's determination, based on the current state of knowledge, that transportation at the collector projects is preferable to spill during the summer. ER307-310, 656-661. Since 1982, the Corps has been maximizing the transportation of out-migrating fall Chinook. ER307-308,659. Since 1990, while the Corps has been maximizing transportation, the returns of fall Chinook have been overall significantly increasing. *Id.* If there is spill at the collector projects as ordered by the district court, a large portion of fish will migrate through the spillways and not be collected for transportation. ER306-307. Thus, the district court's order requires the Corps to deviate from maximizing transport and allow fish to migrate in-river past the collector projects via the spillgates.

SUMMARY OF ARGUMENT

The district court took the unprecedented step of judicial micro-management of the FCRPS and experimentation with salmon migration by altering longstanding summer operations at five dams along the Snake and Columbia rivers. Carelessly tossing aside the planned operations, the court has imposed an unproven approach to river operations based on its faulty understanding of the governing law and the facts relevant to summer spill. The injunction requires the Corps to provide large amounts of summer spill at the dams, which will significantly reduce the number of fish transported in barges, leaving a large proportion to migrate under the adverse in-river

conditions in this low-water year. In so doing, the court has substituted, at best, an experiment without the means of evaluating the effects of spill on summer migration for the considered scientific judgment of NMFS as to what will work best to ensure salmon survival for this summer. The court manifestly abused its discretion by failing to make requisite findings to support the injunction. The court points to no specific findings or evidence in the record to justify the experiment it has ordered, nor does it even address any of the numerous declarations and evidence put forward by NMFS and the Corps demonstrating the harms and risks associated with this experiment. Instead, the Court rests its order on mistaken interpretations of past NMFS statements and ultimately on the conjecture, not evidence, that additional spill may benefit salmon this summer. The spill will also reduce power generation at the dams, resulting in millions of dollars in forgone revenues and likely increasing electricity rates. In short, ample reasons exist for reversing the injunctive order even before the validity of the 2004 BiOp is addressed.

Moreover, the injunctive order is based on legal error in the district court's holding on the merits that NMFS unlawfully restricted the 2004 BiOp jeopardy determination to impacts from the Action Agencies' discretionary actions. ESA Section 7(a)(2) applies only to actions authorized, funded, or carried out by agencies (*i.e.* actions over which the agencies have discretion an control) and therefore NMFS

correctly rendered a jeopardy determination on those actions within the discretion of the Action Agencies, and not on the existence of the dams, which are properly characterized as part of the status quo or environmental baseline rather than the action subject to ESA's substantive and procedural requirements. NMFS complied with the ESA and regulations by considering impacts from the environmental baseline and cumulative effects in assessing whether the action would cause jeopardy. NMFS is not required to render a jeopardy determination on the aggregate effects of the action, environmental baseline, and cumulative effects.

ARGUMENT

THE DISTRICT COURT ABUSED ITS DISCRETION BY ISSUING A MANDATORY INJUNCTION REQUIRING SUMMER SPILL

I. STANDARD OF REVIEW

This Court applies an abuse of discretion standard in reviewing the grant of a preliminary injunction. *Lopez v. Heckler*, 725 F.2d 1489, 1497 (9th Cir. 1984). This Court "must determine whether the district court applied the proper legal standard in issuing the injunction and whether it abused its discretion in applying that standard." *Caribbean Marine Servs. v. Baldridge*, 844 F.2d. 668, 673 (9th Cir. 1988). An order granting a preliminary injunction may be reversed "if the district court abused its discretion, made an error of law, or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Barahona-Gomez v. Reno*, 167 F.3d 1228,

1234 (9th Cir. 1999); accord *Textile Unlimited, Inc v. A. BMH & Co., Inc.*, 240 F.3d 781, 786 (9th Cir. 2001). The Court reviews issues of law underlying the preliminary injunction *de novo*. *Barahona-Gomez*, 167 F.3d at 1234.

Before granting a preliminary injunction, a district court must find that the moving party has demonstrated either (1) a likelihood of success on the merits and a possibility of irreparable injury, or (2) the existence of serious questions on the merits and a balance of hardships tipping in its favor. *Fund for Animals v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992) (citation omitted). If the public interest is involved, a court must determine whether the balance of public interests supports the issuance or denial of an injunction. *Caribbean Marine Servs.*, 844 F.2d at 674.

In ESA cases, Congress has insisted that species be afforded "the highest of priorities," *TVA v. Hill*, 437 U.S. 153, 194 (1978), but this does not mean that injunctive relief may be granted without a demonstration that there is a likelihood of future harm to the species. *NWF v. Burlington N. RR*, 23 F.3d 1508, 1511 (9th Cir. 1994). Courts are not "mechanically obligated to grant an injunction for every violation of the law." *Id.* at 1512. To the contrary, the movant must show that there is a reasonable likelihood of future harm to the species. *Id.* at 1511. Moreover, nothing in the ESA nor *TVA v. Hill* absolves the district court of ensuring that the ordered injunctive relief is tailored to redress any identified harm.

Finally, Fed. R. Civ. P. 52(a) requires a district court to make findings of fact and conclusions of law to support an injunctive order. *See also* Fed. R. Civ. P. 65(d). Without those findings, this Court cannot effectively review the district court's order. *Inverness Corp. v. Whitehall Labs.*, 819 F.2d 48, 50 (2d Cir. 1987).

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING THE INJUNCTION AND ASSERTING CONTROL OVER RIVER OPERATIONS

The district court issued a mandatory injunction ordering the action agencies to deviate from the long-standing summer operating plans, instituted for the protection of listed species. Mandatory preliminary injunctions – injunctions that require a change in the status quo rather than those that preserve the status quo – are disfavored and should be denied unless the facts and law clearly favor the moving party. *E.g., Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994). NWF did not make such a showing. Moreover, the court abused its discretion by failing to tailor its relief to the alleged harm and ESA violation it perceived. *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991).

By issuing its mandatory order, the court has for the first time injected itself into the day-to-day management of an extremely complicated system of dams. *See* ER271-273. Courts lack the expertise to undertake this task and should not be in the

business of running dams.[5] *See South Dakota v. Ubblelohde*, 330 F.3d 1014, 1030-31 (8th Cir. 2003); *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1571 (9th Cir. 1993). Moreover, the court did not address any of the agencies' evidence of the significant harms the injunction may impose on both the fish and electric power rate-payers, employed truncated procedures, and engaged in a legally erroneous analysis of the merits.

The court also engaged in an extensive substitution of its judgment for that of NMFS. Underlying most of the court's rulings is the assumption that the listed species are "in serious decline and not evidencing signs of recovery." *See* May 26 Op. 9. In reaching that conclusion, the court relied on a report from a scientific panel (the Biological Review Team (BRT) report). ER331,369-377. The BRT report, however, only examined data through 2001. ER620. The court did not acknowledge NMFS's contrary and more comprehensive conclusions, made with more current

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[5] In previous FCRPS cases, the district court (Judge Marsh) acknowledged this. *See American Rivers v. NMFS*, No. 96-384-MA at 30, 1997 WL 33797790 at *12 (D. Or. April 3, 1997) ("The parties raise numerous other issues which I consider questions of FCRPS micro-management and not the proper subject of judicial review"); *Idaho Dep't of Fish and Game v. NMFS*, 850 F. Supp. 886, 889 (D. Or. 1994) ("[A]ny injunction against transportation would immediately necessitate some form of replacement system management – such as an improved spill program . . . a particularly inappropriate task for the federal judiciary."); *id.* (denying injunction against transportation because it would necessitate "judicial micromanagement of the Columbia River power system.").

information. ER621-623. This basic misconception led the Court to further substitute its judgment – without any explanation – for that of the agency as to what measures should be taken to enhance fish survival.

For all these reasons, the injunctive order should be reversed without regard to whether the court correctly held the 2004 BiOp invalid.

A. The District Court Abused its Discretion by Entering a Preliminary Injunction Without a Showing of Irreparable Harm to the Fall Chinook.

The district court misstates the standard for issuing an injunction in the ESA context, asserting that harm to the species can be presumed from a violation of the statute. ER567-568. To the contrary, this Court ruled in *NWF v. Burlington Northern R.R.*, that there must be "a definitive threat of future harm to the protected species, *not mere speculation*" to support an injunction for an ESA violation. 23 F.3d at 1512 n.8 (emphasis added).

The district court erred by relying on *Thomas v. Peterson*, 753 F.2d 754, 763-64 (9th Cir. 1985), to conclude that harm can be presumed in this case. In *Thomas*, this Court distinguished between substantive and procedural requirements in the ESA, and found that an injunction was warranted for a "substantial procedural violation" of the ESA, namely where an action agency utterly failed to prepare a required biological assessment that would have started the consultation process. *Id.* (emphasis

added).[9] Here, the action agencies fulfilled their procedural obligations under ESA section 7(a)(2) by consulting with NMFS. *Pyramid Lake Paiute Tribe of Indians v. Dept. of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990) (discussing distinction between procedural and substantive obligations under ESA §7(a)(2)). That a district court later purported to find flaws in the analytical substance of the resulting biological opinion does not entitle NWF to an automatic injunction or excuse it from the obligation to demonstrate irreparable harm to listed species from the particular activity sought to be enjoined. The district court abused its discretion by applying the wrong legal standard.

The district court also asserted that "irreparable injury will result if changes are not made" to river operations and "that irreparable harm results to listed species as a result of the action agencies' implementation of the updated proposed action." ER567-568. It is not clear from the opinion why the district court thought irreparable harm would result from the planned maximization of transportation this summer. The only possible justification contained in the opinion is the suggestion that the UPA "would not allow a meaningful evaluation of the summer transportation program."

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[9] This Court recently reiterated the principle that the remedy for a "substantial procedural violation" of the ESA is an injunction to maintain the status quo until the consultation process is completed. *Washington Toxics Coalition v. EPA*, No. 04-35138 (9th Cir. June 29, 2005). In *Washington Toxics*, unlike here, the Action Agency did not initiate consultation. *Id.*

ER568. However, the UPA *does* contemplate research on the relative benefits of transport and that study will be implemented after completion of planned surface passage improvements to ensure that the research yields results that will be relevant and useful in the future. ER1593. *See also* ER102-103,266,267,292,294-295. The district court did not make a finding that waiting to perform research on in-river passage versus transport until after the completion of passage improvements would lead to irreparable harm this summer. Rather, the court reached the flatly incorrect conclusion that "the proposed action analyzed in the 2004 BiOp allows for no voluntary spill at four lower Snake River and Columbia Dams . . . during the summer transport period." ER568.

Even if the district court had articulated why it thought harm would result from waiting until passage improvements are made to perform study, the finding of irreparable harm this summer would have been clearly erroneous in the face of the undisputed record evidence that shows that returns of fall Chinook have increased over the last several years under the transportation program the Corps had planned to continue to implement this summer. ER621-623 (stating, for example, that "long- and short- term trends in productivity are at or above replacement," and that recent

scientific studies "indicate that at least for the short-term, the population has been increasing"); ER307-308.[7]

To the extent that the district court intended to imply that the 2004 BiOp itself contains an admission of irreparable harm to the fall Chinook from the planned maximization of transportation of spill this summer, ER567, that finding is clearly erroneous. The passage quoted by the district court only states that the existence of the dams – which the Corps is powerless to remove – and certain other non-discretionary operations of the dams "account[s] for most of the mortality" of juveniles migrating through the FCRPS. ER672. The passage does not indicate that maximizing transportation this summer will cause *any* harm, let alone *irreparable* harm, to the fall Chinook or address the relative effects of maximizing transportation of the fish or of allowing many of them to migrate in-river by spilling water at all FCRPS dams. *Id.*

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[7] Although the district court, *in its summary judgment opinion*, questioned as a legal matter the agency's reliance on the recent upward trend in returns to reach a no jeopardy conclusion, ER351 n.12, the district court did not purport to find that the recent upward trend does not exist. And though the court noted (*id.*), without drawing any conclusions, that the recent study had not been peer reviewed, the ESA requires NMFS to "use the best scientific and commercial data available." 16 U.S.C. §7(a)(2). It is NMFS, not the district court, that has the scientific expertise to determine if studies are reliable regardless of whether they have been peer reviewed.

Finally, the district court limits its discussion of harm to the four collector projects and makes no finding whatsoever that the level of spill planned for this summer for Ice Harbor dam, a non-collector project, will harm the fall Chinook. ER567-568. Thus, the court's order to increase spill at Ice Harbor is manifestly an abuse of discretion.

In cases like this one where there is no irreparable harm, it is unnecessary to reach the merits before denying a preliminary injunction. *Oakland Tribune, Inc. v. Chronicle Pub. Co.* 762 F.2d 1374, 1377 (9th Cir. 1985). In sum, the court did not make the requisite finding of irreparable harm before issuing the preliminary injunction, nor would the record have supported such a finding. *See* Fed. R. Civ. P. 52(a), 65(d).

B. The District Court Abused its Discretion by Failing to Tailor the Injunctive Relief to Remedy the Harm Alleged or the Errors Found

"Injunctive relief . . . must be tailored to remedy the specific harm alleged" *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991). Moreover, an "overb[roa]d injunction is an abuse of discretion." *Id.* The district court abused its discretion here by failing to tailor its relief to the alleged harm it perceived – in this case NMFS's allegedly faulty jeopardy analysis. ER567-568. Nowhere in its eleven-page opinion does the district court explain how requiring spill

at dams where fish are normally collected for transportation remedies any alleged harm caused by NMFS's jeopardy analysis. This omission is fatal. *See id.*

In addition, the scientific evidence before the court does not support the conclusion that harm to the fall Chinook will be remedied by shifting from dam operations that maximize transportation to those that maximize spill and in-river migration. Furthermore, the spill threatens to harm other listed species by making up-river migration more difficult.

1. The District Court's Conclusion that Added Spill Will Help the Fall Chinook is Contrary to NMFS's Professional Judgment and the Record Evidence

NMFS has concluded that the maximization of *transportation* at the collector projects is the fish management strategy least likely to put the fall Chinook at risk this summer. As the expert agency that Congress has charged with making scientific determinations regarding fish, its scientific judgment is entitled to deference. *See Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989). The court's order requires a radical departure from that management strategy, is not based on record evidence, and does not address the considerable evidence submitted by the federal defendants showing the problems with, and possible irreparable harm resulting from, the spill ordered by the court. *See* Fed. R. Civ. P. 52(a), 65(d).

The court's injunction requiring spill at the collector projects will reduce the number of fall Chinook transported in barges because many fish will pass through the spillways and continue their migration in-river rather than be collected for transportation. *See* ER168,306-307,308-309,658-659. Although the effects of transportation relative to providing spill at the collector projects are scientifically uncertain (ER 644-651), NMFS has exercised its expert professional judgment and concluded that continuing to maximize transportation is currently the best option. Simply put, NMFS rejected a shift away from the existing transportation regime and towards additional spill, pending development of better information about the relative benefits of transport. ER656-660,1013. The 2004 BiOp concludes that "[w]ithout better information, a change to a strategy of leaving more fish in the river could either further improve or instead reduce the level of adult returns. The risk of a reduction in adult returns associated with leaving more fish in the river is *less acceptable* than the risk of failing to achieve even higher adult returns than the record numbers observed during the past four years." ER659 (emphasis added); *see also* ER167-169,306-310. The court has imposed unwarranted risks by substituting its judgment for that of NMFS and imposing an untried and experimental approach for fish migration this summer.

The district court completely ignored evidence submitted in opposition to the preliminary injunction. Although the Tribes in their stay papers asserted that the district court carefully considered the evidence presented, that assertion is belied by the fact that this Court will not find even one reference in the district court's injunction opinion to any of the numerous detailed declarations provided by NMFS and Corps scientists and engineers explaining the difficulties with NWF's requested relief. The district court declared that it would not permit oral testimony, and denied the Federal Defendant's request to conduct discovery into the basis of the scientific opinions of NWF's experts. ER322,382.[8/]

Even more fundamentally, the district court's injunction order does not acknowledge any of the complexities of river system operations described by the agencies' scientists and engineers. For instance, the court failed to address the evidence that spill of the type requested by NWF will cause egress problems such as eddies in the tailrace of the dams that will delay fish in their outmigration, thus exposing them to more predators. ER174,261,263. In-river summer migration will

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[8/] Although this Court has held that the refusal to hear oral testimony on a preliminary injunction request is not an abuse of discretion "if the parties have full opportunity to submit written testimony and to argue the matter," *Stanley*, 13 F.3d at 1326, in that case, for example, the district court had accepted the appellant's offer of proof as conclusive proof and the appellant had not availed herself of a provided opportunity for discovery.

also expose fish to potentially dangerous high water temperatures for longer than transportation. ER1334-63, 1435-54 (also noting other physical factors that affect fish survival when migrating via spillways including the amount of spill and amount of flow).[9] It is unknown whether summer spill will adversely affect fish that holdover in the river to migrate out once they have reached the age of one year, when they are larger and more resilient, a group that has particularly strong adult return rates. ER1322. Finally, large quantities of spill, like those ordered here, can interefere with the adult migrants of other listed species. ER1013,1436.

The court premised its spill relief on conjecture, not evidence or findings based in the record, that increased spill will be better for summer migrants. Premising such extraordinary, mandatory relief on conjecture, contrary to the evidence and judgment of the expert agency, is an abuse of discretion.

No amount of speculation by counsel about what the district court could have found given the evidence in front of it can substitute for the required findings. The

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[9] With the consent of the other interested parties, the Corps has developed an operating plan for implementing the court's order to minimize harm to fish from two other potential negative impacts of the ordered spill that the court's order also fails to address: dangerously high levels of total dissolved gas in the river and interference with studies planned for this summer. Even so, there is no guarantee that the Corps will be able to accomplish those goals under the operational constraints imposed by the injunction. *See* NWF Supp. Attachment, NWF Exh. B (implementation plan); ER119-120,261-262,263,265,266,268,290-291,489-490,548.

evidence that the proponents of spill have cited in prior arguments to this Court to support their position that spill is best is either conclusory, *e.g.*, NWF Exh. 32 at 12[10], advocates spill because the author believes it *might* increase returns, *e.g.*, NWF Exh. 7 at 4-5, NWF Exh. 18 at 8, 15, or worse, is taken out of context, *e.g.*, ER1361-62 (AR C.214); ER1278, 1287-88 (2000 BiOp) (all describing spill as the best option for passage *through* the dams – *i.e.*, compared to passage through turbines – and drawing no conclusion whatsover about the efficacy of spill compared to passage *around* dams via transportation); ER1293-97 (2000 BiOp) (noting only that the *spring* spill program provides increased survival).[11] Judicial experimentation with endangered species is particularly inappropriate when the responsible federal agency has concluded that a different management policy – here, transportation of the fish past the dams on the river system – is currently the most sound approach to ensuring

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[10] References to "NWF Exh." refer to attachments to NWF's Responses to the Emergency Stay Motion.

[11] The Federal Defendants and NWF also submitted competing declarations based on scientific modeling. *Compare* NWF Exh. 1 (declaration of Thomas Lorz, predicting that summer spill will increase returns) *with* Toole Decl. (explaining faulty assumptions made by Lorz and that a corrected analysis would show summer spill would decrease returns). ER 389-474. The district court neither addressed this factual dispute nor probed into it by, for example, allowing discovery or permitting an evidentiary hearing.

species survival. ER306-310,658-661,1013. The district court has substituted its own scientific judgment for NMFS's by concluding otherwise.

Simply put, this is not a case where it is relatively easy to identify and prevent harm to listed species, such as when a prohibitory injunction enjoins a timber sale that would eliminate some habitat for a species. Rather, the district court here was faced with a choice between two methods for protecting a listed species: keeping the spillgates closed at the collector projects and thereby maximizing the collection and transport of fall Chinook past the dams and reservoirs on the Columbia and Snake rivers, or allowing the fish to migrate in-river by passing through the spillgates at collector projects. Without even acknowledging the contrary evidence before it, the district court chose the latter option, an untested approach for the summer-migrating fall Chinook. Given the evidence before the district court, the court's conclusion that its injunctive relief will improve survival rates is clearly erroneous. ER1013.

2. The District Court Clearly Erred in Finding that the Spill Required by its Injunction is Consistent with the 2000 BiOp

To the extent any basis can be gleaned from the district court's opinion, the district court erroneously asserts that the ordered spill regime is consistent with what was required in the 2000 BiOp's RPA. ER567-568. In fact, the 2000 BiOp did not specify spill levels, let alone require a shift to a regime that maximizes spill like the district court's order. ER1284-85. The district court does not cite to any particular

portion of the 2000 BiOp for its erroneous assertion, but by stating that "the RPA for the 2000 BiOp targed spill during summer months at a level minimally necessary to allow for a meaningful in-river migration program against which the summer transportation proram would be compared" (ER 567-568), it appears to be relying on Action 46. However, Action 46 did not require spill at the dams at issue in this litigation. ER1284-85. Action 46 simply called for a *study* to compare the effects of transporting fish with the alternative of in-river migration under suitable conditions in the lower Snake River. The 2000 BiOp said that the "development of the specific study protocol should be coordinated through the Regional Forum and research processes." ER1285. This study was initiated in 2000 by testing the effects of summer spill on passage survival at Ice Harbor Dam, a non-collector project. ER1696-1718. In addition, gathering data about transporting these fish continued in 2001 consistent with the 2000 BiOp, Action 46. Results of these studies are presented at ER315-318,1310. Further testing of in-river migration by spilling at the collector projects was set to begin after completion of necessary transmission line upgrades by 2004. ER1285. In short, any additional spill associated with Action 46 was for study purposes only and was not a finding by NMFS that spill at these dams during the summer would avoid or reduce mortality to migrating salmon as the district court assumes.

Furthermore, as explained *supra*, the court's related conclusion that the updated proposed action evaluated in the 2004 BiOp "would not allow a meaningful evaluation of the summer transportation program" as described in the 2000 BiOp is clearly erroneous. ER569. The 2004 UPA includes a comprehensive evaluation of the relative benefits of transport. Under the UPA, a study of in-river migration will be implemented after completion of fish surface passage improvements to ensure that the research yields results will be relevant and useful in the future. ER1593. *See also* ER102-13,292,294-295. The UPA – *like* the 2000 RPA and *unlike* the spill ordered by the district court – leaves the determination of spill levels for the research to be developed and coordinated through the NMFS Fisheries' Regional Forum and research processes. *See* ER1593. It is difficult to fathom how the district court's ordered maximum spill regime can provide for a more "meaningful evaluation" of the usefulness of summer spill than a study carefully designed by researchers and scientists after the completion of the planned improvements that will aid fish passage. While a carefully designed study of the relative benefits of transport at the collector projects as contemplated in the UPA may be helpful for planning in *future* years, it has nothing to do with preventing irreparable harm *this* summer, which is required to

justify a preliminary injunction for this summer's operations.[12] Thus, the district court's suggestion that the spill it ordered can be justified by research needs and objectives and the 2000 BiOp is without foundation in the record and clearly is not tailored to remedy any harm the district court might have perceived.[13]

C. The District Court Abused its Discretion by Failing to Accord Proper Weight to the Public Interest.

The public interest is an "element that deserves separate attention." *Sammartano v. First Judicial District*, 303 F.3d 959, 974 (9th Cir. 2002). The spill ordered by the court is merely an experiment for which there is questionable evidence that any benefit would accrue to the species. In these circumstances, the court abused

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[12] The district court also suggests that an injunction was necessary to preserve the "spread the risk" considerations that NMFS applied in the 2000 BiOp to the spring (not summer) migration. ER569. However, while NMFS adopted a spread the risk approach for spring migration in the 2000 RPA, it expressly did not adopt such a policy for summer migrants because of the adverse river conditions facing summer migrants. ER1285. Thus, the district court again mistakenly compares apples with oranges in reaching its conclusions. Viewed as a whole, the UPA provides greater benefit to listed species than the measures contained in the 2000 RPA. ER93-107,292-296.

[13] Nor are the issues in this case like the issues presented in the Federal Defendants' emergency motion denied by this Court last summer. Last year, it was the agencies who sought to deviate from the 2000 BiOp status quo by ceasing planned summer spill at the four non-collector projects. This year, the district court has ordered the agencies to deviate from the 2000 BiOp and 2004 BiOp status quo by providing spill at the four collector projects and increasing spill at Ice Harbor.

its discretion by failing to include in the balance the harm to the public from an estimated $67 million in lost electricity production by Bonneville Power Administration and likely rate increases to customers.[14]

III. The Injunction is Based on Legal Errors on the Merits.

Legal error and a misapprehension of the law with regard to underlying issues in a case are grounds for reversal of an order granting a preliminary injunction. *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir. 1996). In its injunctive order the district court repeatedly indicates that the ESA violation on which it based the injunction was its holding in the May 26, 2005, order that NMFS unlawfully restricted the 2004 BiOp jeopardy determination to impacts from discretionary aspects of the proposed action. *See* ER562,565,566,567.[15] This merits issue is a legal question reviewable *de novo*.

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[14] A declaration before the district court gave the combined cost of all the injunctive measures requested by NWF, but the Norman declaration filed with our emergency stay motion (Supp. Attachment A), gives the estimated cost of the spill ordered by the court.

[15] The district court also erred in summarily holding that the Corps relied on NMFS's no jeopardy determination in the 2004 BiOp without any independent basis for doing so and therefore violated the ESA. ER565. The lower court did not review the Corps' administrative record. If it had, it would have discovered that the Corps in fact had conducted an independent assessment of the effects of the 2004 UPA and this assessment demonstrates that the Corps' met its duty under ESA Section 7(a)(2) to ensure that its actions avoid jeopardy. *E.g.*, ER1668-94.

We recognize that legal issues, particularly complex legal issues, need not be finally resolved by this Court in an interlocutory appeal from the grant of a preliminary injunction. *Lopez v. Heckler*, 725 F.2d 1489, 1498-1499 (9th Cir. 1984). Indeed, this Court will not typically reach the merits of a case when reviewing a preliminary injunction entered in an early stage of litigation where facts are undeveloped and the merits involve application of the law to the undeveloped facts. *See Nader v. Brewer*, 386 F.3d 1168, 1169 (9th Cir. 2004). However, this is a record review case in which the district court has made its final determination at least as to NMFS on the merits of the claims on which the preliminary injunction is based (but has not yet rendered a final judgment). Accordingly, we submit that it is appropriate for the Court to here provide plenary review of the first two merits issues addressed in the May 26, 2005, district court opinion, which the district court relied upon in its injunction order. Should this Court nonetheless decline to address the merits or provide only limited review of the merits issues, we request that it make clear that the Federal Defendants retain the right to seek full *de novo* appellate review of these issues after the lower court renders a final judgment or comparable appealable order.

A. NMFS's Approach of Assessing Whether the Discretionary Actions of the Federal Action Agencies Result in Jeopardy is Valid.

1. NMFS's Approach Comports with the Plain Language of the Statute and Regulations

The scope of the consultation and analytical approach taken in the 2004 BiOp is founded on the understanding that "action" is limited to actions within the authority and discretionary control of the action agency and that the dams' existence is not properly treated as part of the discretionary agency action. NMFS's interpretation of the statute as applying only to discretionary agency actions, including instances in which there is a mixture of discretionary and nondiscretionary conduct, should be upheld under a plain language analysis. Even if the statute is ambiguous on this issue, NMFS's interpretation of the statute is entitled to deference and must be upheld because it is a permissible interpretation. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-864 (1984); *National Cable & Telecommunications Assoc. v. Brand X Internet Services*, No. 04-277 slip op. 8-10 (June 27, 2005).

ESA section 7(a)(2) does not impose obligations to consult on, and insure that, "any action" is likely to avoid jeopardy, but rather applies only to "any action *authorized, funded, or carried out* by such agency." 16 U.S.C. §1536(a)(2) (emphasis added). These clearly are qualifying terms that all connote control, conduct and volition. Consistent with this language, the ESA implementing regulations make clear that those actions subject to the agencies' ESA obligations include only actions over which an agency has discretionary involvement or control.

50 C.F.R. §402.03 ("Section 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control"); *see also* 50 C.F.R. §402.02 (defining "jeopardize the continued existence of" by reference to the action alone: "to engage in an action that reasonably would . . . reduce appreciably the likelihood of both the survival and recovery . . . .") (emphasis added). Consistent with an understanding that it is discretionary agency action that must avoid jeopardy, the statute directs that the biological opinion detail "how the agency action affects the species or its critical habitat." 16 U.S.C. §1536(b)(3)(A) (emphasis added). The regulations reiterate that the biological opinion must include a detailed examination of "the effects of the action" on listed species or critical habitat and a determination of whether or not "the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat." 50 C.F.R. §402.14(h)(2)-(3) (emphasis added). *See also* 51 Fed. Reg. at 19,932 ("The Service's finding under §7(a)(2) entails an assessment of the degree of impact that action will have on a listed species."). As discussed further in Section III.B below, the distinction in the regulations between impacts attributable to the "environmental baseline" and the "action" lends additional support to the position that the "actions" on which NMFS must consult and render a jeopardy determination are those actions

over which the action agencies have discretionary control, not the presence of dams, which the agency has no authority to remove.

2. NWF's Alternative Interpretation of the Statute and Regulations is Meritless

NWF advocates a broader interpretation of the "action" subject to the ESA consultation requirement and jeopardy standard, contending that the "action" on which the action agencies must here consult is both the existence of the dams and the Corps' and BOR's discretionary operations or modifications of those dams. NWF argues that the plain language of the statute compels this broad description of the federal action, specifically pointing to the statutory and regulatory language requiring consultation on "'*any* action'" and "'*all* activities or programs of *any kind*'" by a federal agency. NWF Response to Emergency Stay Motion at 19-20 ("NWF Response"), quoting 16 U.S.C. §1533(a)(2) and 50 C.F.R. §402.02, respectively (emphasis added by NWF). But as discussed above, that simply misreads the relevant language. The existence of the dams on the Columbia and Snake Rivers are not actions "authorized, funded, or carried out" by either the Corps or BOR in 2005. Rather, the dams' existence is entirely a congressional decision. *See NWF v. Army Corps of Engineers*, 384 F.3d 1163, 1179 (9th Cir. 2004) ("Congress's decision to

build the four dams on the lower Snake River was a matter of policy, and Congress alone in its legislative function must determine if the dams are to remain").[16]

Second, NWF argues that the statute and regulations require that if there is any discretionary involvement in an action that warrants initiation of consultation, further distinctions about the extent of the agency's discretion are relevant only when deciding whether an action that causes jeopardy can be modified or mitigated to avoid jeopardy. NWF Response at 22. NWF relies on two statutory provisions that provide: (1) if NMFS determines an action will cause jeopardy, it must propose a Reasonable and Prudent Alternative ("RPA") to avoid jeopardy that can be taken by the federal agency consistent with the agency's legal authority and jurisdiction (*see* 16 U.S.C. §1536(b)(3); 50 C.F.R. §402.02), and (2) that an action agency may apply to the Endangered Species Committee ("Committee") for an exemption from the no jeopardy requirement of §7(a)(2) (*see* 16 U.S.C. §§1536(a)(2), 1536(g); 50 C.F.R. §402.15(c), pt. 451). NWF reasons that if consultation addresses only discretionary actions, the RPA and Committee provisions would be rendered unnecessary and

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[16] Oregon has suggested (Response to Stay at 6) that the existence of the dams are a continuing federal agency action within the ambit of this language. To the contrary, from neither a linguistic nor common sense perspective can inert structures be characterized as ongoing agency conduct. Even if the existence of dams could be characterized as "action," it is congressional action, not federal agency action.

superfluous. This reasoning is fallacious. A discretionary action can result in a "jeopardy" conclusion for which there may not be a reasonable and prudent alternative, which would necessitate resort to the Committee. This is because an alternative that would avoid jeopardy but not accomplish the purpose and need for an action would not satisfy the regulatory definition of a reasonable and prudent alternative. 50 C.F.R. §402.02. Or, an action agency may decide as a matter of policy to apply to the Committee, which could grant an exemption pursuant to 16 U.S.C. §1536(h). In short, neither the RPA nor exemption process is rendered superfluous by recognizing that the ESA procedural and substantive requirements apply only to discretionary agency actions. Furthermore, NWF's interpretation is untenable because to treat structures or conduct which an agency has no discretion to change as an "action" for consultation effectively renders the consultation process an exercise in futility.

3. NMFS's Interpretation is Consistent with the Case Law

This Court has repeatedly confirmed that "[w]here there is no agency discretion to act, the ESA does not apply." *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1125-1126 (9th Cir. 1998); *Turtle Island Restoration Network v. NMFS*, 340 F.3d 969, 974 (9th Cir. 2003); *see also Sierra Club v. Babbitt*, 65 F.3d 1502, 1511-12 (9th Cir. 1995) (no ESA consultation required where agreement granting right-of-way

deprived federal agency of discretion to influence private activity for the benefit of listed species); *Envtl. Prot. Info. Center v. Simpson Timber Co.*, 255 F.3d 1073 (9th Cir. 2001) (agency not required to reinitiate consultation on species listed after issuance of permit because agency did not retain discretionary control to require private party to take actions for benefit of species).

The principle that the ESA consultation duty applies only to discretionary actions logically extends to limit the scope of consultation in cases where there is sufficient discretion to warrant consultation. In *Ground Zero Center for Non-Violent Action v. United States Dep't of the Navy*, 383 F.3d 1082, 1092 (9th Cir. 2004), the issue was, like here, the scope of consultation. This Court approved limiting the ESA consultation to discretionary aspects of a federal program, rejecting a claim that the Navy had to consult on the location where the program would be carried out "because the Navy lacks the discretion to cease Trident II operations at Bangor for the protection of the threatened species" and any consultation regarding risks to species "if such risks arise solely from the President's siting decision, would be an exercise in futility." 383 F.3d at 1092. NWF has suggested that the case is inapposite because the siting decision was a presidential decision and the President is not a federal agency subject to the ESA. NWF Response at 23. That is a distinction without a difference. Here Congress has made the decision concerning dam

existence. Congress, like the President, is not a federal agency subject to the ESA. In short, *Ground Zero Center* is a case about the scope of the agency's consultation obligation and is directly on point.

Notably, in cases holding that consultation was not required or appropriately limited, there indisputably was an "agency action." *E.g.*, *Sierra Club*, 65 F.3d at 1506-1507 (BLM approval for road construction); *Envtl. Prot. Info. Ctr.*, 255 F.3d 1073 (9th Cir. 2001) (ongoing Fish and Wildlife Service permit); *Ground Zero Center*, 383 F.3d 1082 (9th Cir. 2004) (action to site and construct a naval facility). The key point for this Court, however, was that while there was an "agency action," the respective agencies lacked discretion or control to alter that action in a manner to benefit listed species. If NWF's view of the law were correct, an agency's lack of control or discretion should have been irrelevant to the necessity for, and scope of, the consultation. Under NWF's theory, in each of those cases the agencies should have been required to consult on their "agency action" and if after such consultation a jeopardy conclusion were reached, and no RPA were possible because the agencies lacked discretion to alter their action, then the agencies should have convened the Committee. Of course, however, the Court did not reach such a conclusion. Rather, consistent with the Federal Appellants' position here, this Court found that the requirements of ESA section 7(a)(2) did not apply to actions over which the

respective agency possessed no discretion or control over the action to benefit listed species. And so it is here with respect to the existence of the dams and other non-discretionary aspects of the hydrosystem operations.

The Supreme Court recently emphasized that the scope of an agency's discretion is the critical factor in determining the proper scope of analysis in an Environmental Assessment prepared under the National Environmental Policy Act ("NEPA"). *See Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 768-770 (2004). The Court held that because the federal agency had no discretion to bar qualifying trucks from entering the United States, it did not have to evaluate under NEPA the environmental effects of lifting a moratorium and allowing Mexican trucks in. The Court made clear that the agency's analysis should focus on the "incremental impact" of just those actions that the agency has discretion to control, and that "cumulative effects" should be considered separately and not as part of the agency action itself. *Id.* at 770. *Public Citizen* supports NMFS's approach here, as the NEPA concept of "action" largely parallels that of the ESA. *See Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1075 (9th Cir. 1996) ("[t]he standards for 'major federal action' under NEPA and 'agency action' under the ESA are much the same").

In its response to defendants' stay motion, NWF and Oregon incorrectly asserted that the approach NMFS employed in the 2004 BiOp was rejected by this

Court in *ALCOA v. BPA*, 175 F.3d 1156, 1162 n.6 (9th Cir. 1999). NWF Response at 18. To the contrary, the approach of the 2004 BiOp is not remotely equivalent to the unsatisfactory approach advocated by industry there. The Court there agreed with NMFS that the regulatory definition of jeopardy does not mean that any incremental improvement over previous operations automatically should result in a "no jeopardy" conclusion. *Id.* Unlike that rejected approach, the 2004 BiOp does not rest on any finding that the proposed action is less harmful than past operations. Rather, the 2004 BiOp determines whether the proposed action would have a net adverse effect as compared to an operation representing the unavoidable minimum mortality from the hydrosystem's prospective operations, if all the agencies' discretion (and more) were exercised in favor of fish (the "Reference Operation"). Thus, the Action Agencies here are held to a much higher standard than simply to do better than in the past.

In sum, while the Action Agencies possess discretion to operate the dams in a manner beneficial to fish and therefore have a duty to consult, it does not follow that the analysis may not differentiate between impacts attributable to the discretionary operations and those attributable to the existence of the dams and other nondiscretionary aspects. Separating the existence of the dams from the discretionary actions is necessary to make Section 7 consultation meaningful and precise.

B. The existence of the dams and nondiscretionary operations are properly assigned to the environmental baseline

NMFS's differentiation between discretionary and nondiscretionary actions finds further support in the fact that the regulations distinguish between effects attributable to the environmental baseline, the action itself, and cumulative effects. The district court suggested that assignment of nondiscretionary elements to the baseline improperly allows an action agency to exempt itself from accountability. ER345. However, an agency cannot arbitrarily evade responsibility by declaring elements nondiscretionary. The 2004 BiOp analysis considers the dams' existence and six BOR projects with non-discretionary commitments to be nondiscretionary and assigns effects from these items to the baseline. ER644. The bulk of effects put into the environmental baseline here stem from the existence of the dams.

NMFS has consistently identified the existence of the dams as part of the environmental baseline. *See* ER1204. Case law supports this view. *See Idaho Dept. of Fish and Game v. NMFS*, 850 F. Supp. 886, 894 (D. Or. 1994) (recognizing that dam existence is part of baseline), vacated as moot, 56 F.3d 1071, 1075 (9th Cir. 1995). This Court recently recognized in an analogous case that the dams' existence cannot reasonably be said to "cause" violations of the Clean Water Act, reasoning that the Act's directive to comply with state water quality standards must be construed in *pari materia* with statutory directives that the dams be built. The Court

thus held that only *discretionary* operations must be consistent with state water standards. *NWF v. Army Corps of Engineers*, 384 F.3d 1163, 1178-79 (9th Cir. 2004). Action Agencies should not be held responsible for impacts caused by the existence of dams because they have no authority to remove them.

C. NMFS's Jeopardy Determination is Properly Based on the Net Impacts of the "Action," Not on Aggregate Effects from the Action, Baseline, and Cumulative Effects

The district court suggests agreement with an argument made by NWF and Oregon in district court that NMFS's regulations require it to literally add together impacts to species resulting from baseline conditions, cumulative effects, and the impacts of the proposed action, and render a jeopardy determination on the combined effects. A rigid summation or "aggregation" approach is not required by the statute or regulations. The statute requires NMFS to determine whether the "action" is likely to jeopardize and as discussed above, the action which must avoid jeopardy is the proposed discretionary action. Here NMFS considered the effects attributable to the environmental baseline and nonfederal actions in rendering its jeopardy determination on the proposed action. No more is required.

1. <u>The Jeopardy Determination is not Properly Rendered on the Aggregation of Impacts from the Action, Baseline, and Cumulative Effects</u>. – The district court's suggestion that the jeopardy determination should be based on the summation of all

effects is untenable because it would produce absurd results. Since the environmental baseline conditions are the ones that led to the listing of the species in the first place (*see* 16 U.S.C. §1533(a)), they would presumably always "reduce appreciably the likelihood of survival and recovery" regardless of the incremental effects of the proposed action. It also means that actions beneficial for the species could be deemed to cause jeopardy where they do not negate aggregated adverse impacts from the environmental baseline and cumulative effects. The lower court suggests that this consequence for benign or largely beneficial actions would not arise because formal consultation is not required unless an action is likely to adversely impact a species. ER349. The court is wrong in assuming that consultation for largely beneficial actions can always be avoided. In fact, formal consultation is required whenever an action causes any take of a listed species or more than negligible, discountable adverse effects, regardless of the net benefits of the proposed action. *See* 50 C.F.R. §402.14(a)-(b)(1) (formal consultation required where an action "may affect" species or critical habitat, unless consulting agency concludes "not likely to adversely affect"); ER1299.

Nor do NMFS's regulations require a summation approach in which jeopardy is rendered on the total effects of the action, baseline, and cumulative effects. The environmental baseline and cumulative effects are relevant and taken into account in

a jeopardy analysis, along with NMFS's evaluation of the current status of the species, because they provide context relevant to evaluating the significance of adverse impacts from an action, *i.e.* a net reduction in a species' reproduction, numbers or distribution caused by the action. For example, NMFS's regulations require it to "evaluate" "whether the action, taken together with cumulative effects, is likely to jeopardize." 50 C.F.R. §402.14(g)(4). NMFS reasonably reads the regulation as allowing the agency to evaluate the action in light of or taking into account cumulative effects, not as requiring that the jeopardy determination be made on the aggregation of effects from the proposed action and cumulative effects.

The district court suggests that 50 C.F.R. §402.02, defining "Effects of the action" to include direct and indirect effects of an action "that will be added to the environmental baseline" requires the jeopardy determination to be made on the summation of effects from the action and baseline. To the contrary, that regulatory language, consistent with the statute's focus on the agency "action" under consultation, merely recognizes that after the present consultation is concluded, the effects of the action will then be "added," as a matter of fact, to the environmental baseline for all future consultations. Notably, the environmental baseline is defined to specifically include proposed federal actions that have completed consultation, but

not proposed federal actions on which consultation has not been completed. *Id.*[17] Thus, consistent with the district court's 2003 opinion, the proposed action should not be added to the environmental baseline until consultation is complete. *NWF v. NMFS*, 254 F. Supp. 2d at 1213-1215.

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[17] The ESA Consultation Handbook, a nonbinding guidance document, is consistent with this understanding. The Handbook confirms that the baseline and cumulative effects are separate categories from the effects of the action and that while the baseline and cumulative effects are considered, the jeopardy determination is on the effect of the action. For example, the Handbook states that the "action is *viewed against* the aggregate effects of everything that has led to the species current status and, for non-Federal activities, those things likely to affect the species in the future." ER1303(emphasis added). The "final analysis then looks at whether, *given* the aggregate effects," the species can be expected to survive and recover. *Id.* (emphasis added).

Oregon has argued that the Consultation Handbook at 4-28 to 4-29 (ER1301-02) confirms that the effects attributable to the existence of the dams must be considered in determining whether the proposed action will cause jeopardy. As explained in Section III.C.2 below, the effects of the existence of the dams were considered in the 2004 BiOp as part of the environmental baseline. To the extent that Oregon suggests that the action on which a jeopardy determination is made must include the existence of the dams, the cited pages of the Consultation Handbook do not support this conclusion. Rather, they instruct that in consulting on the Federal Energy Regulatory Commission's issuance of a new license for existing hydropower projects, the projects are treated as new projects. In those cases the dams' existence is considered part of the action, not part of the environmental baseline because the Federal Energy Regulatory Commission has the discretionary authority to deny a license. *Id*; ER648. By contrast, the passage explains, ongoing discretionary operations of water facilities by the Corps or BOR follow the same approach as used in other contexts, *i.e.*, where the effects of past operations are included in the environmental baseline.

To the extent there is any ambiguity as to the meaning of the regulations, the district court's duty was to defer to NMFS's reasonable interpretation of its own regulations as expressed in the 2004 BiOp, not to an alternate (and incorrect) interpretation. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). When an agency interprets its regulations in a statutorily-required document such as a Biological Opinion, the agency's interpretation "assumes a form expressly provided for by Congress" and must be accorded full deference. *Martin v. Occupational Safety & Health Review Com'n*, 499 U.S. 144, 157 (1991).

Oregon and the Tribes suggest that NMFS's interpretation and approach should not be accorded deference because it marks a departure from the approach taken in previous Biological Opinions on the FCRPS. The fact that the analytical approach in the 2004 BiOp is a shift from the 2000 BiOp analysis does not cast doubt on its legitimacy because the agency adequately explained the reasons for doing so. *See National Cable & Telecommunications Assoc.*, slip op. 9-10. Furthermore, these parties ignore that the approach taken in the 2000 BiOp was found invalid, at some of these parties urging, and the shift was in part a direct response to this circumstance. *See id.*; ER598. Moreover, the analysis in the (invalidated) 2000 BiOp was designed to achieve broader purposes than what the Section 7(a)(2) actually requires. NMFS's approach in the 2004 BiOp conforms to the ESA and implementing regulations and

therefore should not be deemed arbitrary and capricious. Furthermore, NMFS has consistently maintained that dam existence is part of the environmental baseline rather than part of the action. *See* Section II.B *supra*. The fact that in the past it has not endeavored to separate the impacts of the action from the environmental baseline does not render it arbitrary and capricious to do so now.

2. NMFS Properly Took into Account Effects from the Environmental Baseline and Cumulative Effects. – In the 2004 BiOp the baseline and cumulative effects are expressly taken into account when determining whether or not a "reduction" caused by the proposed action will likely "reduce appreciably the likelihood of both the survival and recovery of a listed species." 50 C.F.R. §402.02. NMFS explained that, where the baseline is relatively poor, any reduction is more likely to be considered "appreciable." ER598. Thus, for the ten species where the action produced a short-term net reduction to the species' baseline reproduction, numbers or distribution, NMFS considered the effect of the action together with cumulative effects, in light of baseline conditions and species' status, in determining whether there is an appreciable reduction in the likelihood of both survival and recovery.

NWF has argued (NWF Response at 14-16) that NMFS's approach in the 2004 BiOp improperly removed consideration of the environmental baseline and

cumulative effects entirely from the jeopardy determination on the proposed agency action. To the contrary, as is clear from even a cursory review of the 2004 BiOp, NMFS extensively reviewed the current status of the species under the environmental baseline, reviewed cumulative effects, and maintained this discussion as the context informing the overall analysis of all listed species. 2004 BiOp at Chapters 4 (status); 5 (baseline); 7 (cumulative effects); ER617-745,888-902. This was not the only role played by the species' current status, the "environmental baseline" and "cumulative effects." For the nine species for which NMFS found short-term reductions in the reproduction, numbers, or distribution of the species (compared to the Reference Operation's effects), NMFS recognized that it was necessary to place the effects of the action in the context of the environmental baseline and cumulative effects to make an overall determination. NMFS explained how it pulled these threads together in reaching its overall conclusions, and articulated the basis for its conclusion that each ESU could tolerate the short-term risk. *See, e.g.,* ER913-914 (discussion pertaining to fall Chinook). In sum, NWF's contention that NMFS failed to undertake any comprehensive analysis is belied by the 2004 BiOp.

Cases confirm that NMFS's approach is correct, and that a strict "aggregation" approach is not. *See, e.g., ALCOA,* 175 F.3d at 1162 n.6 (NMFS "appropriately considered the effect of future FCRPS operations *within the context of* other existing

human activities that impact the listed species") (emphasis added); *San Francisco Baykeeper v. United States Army Corps of Engineers*, 219 F. Supp. 2d 1001, 1023 (N.D. Cal. 2002)("[t]he consulting agency then determines the effects of the action *with reference to* this 'environmental baseline'") (emphasis added); *Forest Conservation Council v. Espy*, 835 F. Supp. 1202, 1217 (D. Idaho 1993) (NMFS "must simply evaluate the effects of the proposed action . . . *given the* present environmental baseline") (emphasis added), *aff'd*, 42 F.3d 1399 (9th Cir. 1994).

In reaching a contrary result, the district court relied (ER 350) on *Defenders of Wildlife v. Babbitt*, 130 F. Supp.2d 121, 127-28 (D. D.C. 2001), despite the fact that a subsequent decision in the *Defenders of Wildlife* litigation expressly rejected the aggregation approach the court here concluded was implicit in the earlier decision. *Defenders of Wildlife v. Norton*, Civ. No. 99-927 (D. D.C. Jan. 7, 2003), slip op. 9-10. Nor did the court in *Kandra v. United States*, 145 F. Supp. 2d 1192 (D. Or. 2001), hold that NMFS must combine all effects and then determine whether those combined effects are likely to jeopardize.

D. The Preliminary Injunction Cannot Be Upheld on the Basis of the Two Other Grounds for the District Court's Invalidation of the 2004 BiOp

The district court did not justify the preliminary injunction on the two other bases identified in the May 26, 2005, opinion for holding the 2004 BiOp invalid.

Because this Court reviews the issuance of a preliminary injunction under an abuse of discretion standard, it is the rationale provided by the district court in its injunctive order, not an alternative basis offered by counsel, that must withstand scrutiny. Accordingly, these issues are not properly before this Court in this procedural posture. Even if they were, the holdings are erroneous and therefore provide no justification for the injunction.

1. The District Court Erroneously Extended the Rationale of *Gifford Pinchot*

The district court faulted the 2004 BiOp for focusing on whether the proposed action, as compared to the Reference Operation, would reduce the prospects for survival of listed species, stating: "The reasoning in Gifford Pinchot [Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059 (9th Cir. 2004),] applies to the jeopardy analysis in a biological opinion, as well as to the critical habitat determinations. Recovery must be considered separately." ER358. The district court's extension of *Gifford Pinchot* to jeopardy analysis is clearly erroneous. *Gifford Pinchot* held that the Services' regulatory definition of "destruction or adverse modification," 50 C.F.R. §402.02, was unlawful because by requiring adverse impact to both survival and recovery, it allowed the Services to "be indifferent to, if not to ignore, the recovery goal of critical habitat." 378 F.3d at 1070. This Court based this holding on the language in two statutory definitions. The ESA defines the term "conservation" as

"all methods that can be employed to 'bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary.'" 378 F.3d at 1070 (quoting 16 U.S.C. §1532(3)). In other words, "conserving" the species is essentially equivalent to "recovering" the species. The Court then noted that the ESA defines "critical habitat" in terms of the geographical areas "essential for conservation" of a species. *Id.* The Court concluded that "the purpose of establishing 'critical habitat' is for the government to carve out territory that is not only necessary for the species' survival but also essential for the species' recovery" and that Congress intended to protect habitat necessary for a species' recovery not just habitat needed for a species' survival. *Id.*

Nothing in *Gifford Pinchot* suggests that its rationale would extend to the duty to avoid jeopardy. Jeopardy is grounded in the concept of survival through the phrase "continued existence of" in §7(a)(2). *Gifford Pinchot* expressly recognized that Congress intended conservation and survival to be "distinct, though complementary, goals." 378 F.3d at 1070. The statutory language pertaining to conservation that was the linchpin of the Court's analysis of the adverse modification regulation in *Gifford Pinchot* is not applicable to the phrase "jeopardize the continued existence of."

Nor does the regulation defining "jeopardize the continued existence" impose a separate recovery analysis or standard as part of the jeopardy determination.

Because the regulatory definition is worded in the conjunctive -- an action must appreciably reduce both the survival and recovery of listed species to result in a jeopardy determination – there is no need to separately analyze recovery once an action is found to not appreciably reduce survival. *Cf. Gifford Pinchot,* 378 F.3d at 1069 (because the regulatory definition is in the conjunctive it allows a determination to be made based solely on survival).

The preamble to the regulations confirm that "[t]he 'continued existence' of the species is the key to the jeopardy standard, placing an emphasis on injury to a species' 'survival.'" 51 Fed. Reg. at 19,934. Furthermore, the regulation provides for a jeopardy determination only when the action causes an appreciable reduction in survival and recovery "by reducing the reproduction, numbers or distribution of a species" 50 C.F.R. §402.02 (emphasis added), a portion of the regulation ignored by the district court, *see* ER357. By focusing on whether the UPA would cause a reduction in the species' current status, then, NMFS properly applied the regulations.

Neither of the circuit court opinions addressing this issue supports the district court's determination here. The Fifth Circuit in *Sierra Club v. U.S. Fish and Wildlife Service,* 245 F.3d 434, 441-443 and 443 n.61 (5th Cir. 2001) found the adverse modification definition to be invalid for the same reasons expressed in *Gifford Pinchot,* but expressly held that the regulatory definition of "jeopardize the continued

existence" valid. Moreover, *Gifford Pinchot* itself upheld the jeopardy determination without questioning the validity of the regulatory definition of "jeopardize the continued existence." 378 F.3d at 1065-68.

2. NMFS's Critical Habitat Determination was Not Arbitrary or Capricious

The Court found that NMFS's analysis of adverse modification to critical habitat was inadequate with respect to recovery because the short-term degradation of critical habitat was not considered in the context of the species' life cycle or migratory pattern and because NMFS relied on future structural modifications (*e.g.*, Removable Spillway Weirs) to offset the short-term reductions. In reaching these conclusions the court only acknowledged in passing NMFS's finding that safe passage was not of value to fall Chinook for survival because most of these fish are either transported or they are "hold over" fish. The court did not recognize NMFS's further finding that the alterations of critical habitat for fall Chinook would not diminish the value for recovery because the capacity of the habitat, to provide more spill if that were later determined important for recovery, was not reduced by the proposed action. ER914-916. NMFS reasonably concluded that the short-term effects of the action were not likely to destroy or adversely modify critical habitat by appreciably diminishing the value of that habitat for survival or recovery and appropriately concluded that there would be long-term improvements to critical

habitat. *E.g.*, ER830,835-836,914-916. In holding otherwise, the court misapprehended the record and failed to accord NMFS appropriate deference on these issues.

CONCLUSION

The injunctive order should be vacated effective immediately.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Counsel for Federal Defendants are unaware of any related cases.

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CERTIFICATE OF SERVICE

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